IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2367 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES Yes

2. To be referred to the Reporter or not? Yes, but in "Unreported Judgment" section of the Journal concerned. :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO No

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DHIRAJBEN JERAMBHAI KAVAIYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2367 of 1988

MR JR NANAVATI for Petitioner

MR MR MENGDE, AGP for Respondents

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 01/10/2002

ORAL JUDGEMENT

By filing this petition under Article 226 of the Constitution, the petitioner has prayed to issue a writ

of mandamus or any other appropriate writ or order directing the respondents to treat her as Junior Clerk from December 2, 1961, and give her seniority as well as promotion on that basis to the higher cadre of Senior Clerk and the Office Superintendent respectively, with all consequential benefits.

2. The petitioner passed her S.S.C.Examination in the year 1959. By an Office Order dated December 15, 1961, issued by the Dean, Irwin Group of Hospitals, Jamnagar, she was appointed temporarily as a Junior Clerk in the Office of the Dean, Irwin Group of Hospitals, Jamnagar, and was placed in the Grade of Rs. 55-3-85-EB-4-125-5-130 plus usual allowances admissible according to Government Rules with effect from December 2, 1961, for 30 days only because one Shri V.M.Bhatt was promoted as Senior Clerk. A copy of the said Office Order is produced at Annexure-C collectively to the petition. Consequent upon the expiry of sanction for the post of Senior Clerk, the Dean, Irwin Group of Hospitals, Jamnagar, issued another Office Order dated May 3, 1962 by which Mr. V.M.Bhatt, Senior Clerk, was reverted and posted as Junior Clerk on his original post; whereas the petitioner was reverted and posted as Dresser in the Grade of Rs. 30-1-40 plus usual allowances. A copy of the said Office Order is produced at Annexure-C collectively to the petition. From the record of the petition, it is evident that an Office Order dated May 11, 1962 was received from the Director of Health and Medical Services (Med.) Government of Gujarat,Ahmedabad and, therefore, the Dean of Irwin Group of Hospitals, Jamnagar, issued another Office Order dated May 18, 1962, transferring and promoting the petitioner as a Junior Clerk in the Grade of Rs. 55-130 with effect from May 11, 1962, for three months. A copy of the said order is also produced by the petitioner at Annexure-C collectively to the petition. Since the sanction for the post of Junior Clerk temporarily created for three months expired on August 14, 1962, the petitioner was reverted to the post of Dresser in the pay-scale of Rs. 30-1-35 with effect from August 15, 1962 and this is quite evident from the Office Order dated August 17, 1962, produced at Annexure-C collectively to the petition. Again, the Director of Health and Medical Services (Medical), Government of Gujarat, Ahmedabad, posted one Shri G.H.Sheth as Head Clerk on existing vacancy by Office Order dated July 9, 1962 and, therefore, the Dean of Irwin Group of Hospitals, Jamnagar, issued an Office Order dated August 30, 1962 allowing the petitioner to officiate as Clerk in the Grade of Rs. 46-130 with effect from August 16, 1962 to October 14, 1962. It

appears that one Mr. C.J.Purohit, after availing 60 days' leave with effect from August 16, 1962 to October 14, 1962 resumed duties on October 15, 1962 and, therefore, the Dean, Irwin Group of Hospitals, Jamnagar, issued an Office Order dated December 27, 1962 allowing the petitioner to officiate as Clerk with reversion as Dresser with effect from October 15, 1962. This order is also produced by the petitioner at Annexure-C collectively to the petition. On December 29, 1962, the Dean, Irwin Group of Hospitals, Jamnagar, issued an Office Order allowing the petitioner to work as Clerk with effect from November 1, 1962, but by an Office Order No.52, dated March 2, 1963 issued by the Dean, Irwin Group of Hospitals, Jamnagar, the petitioner was reverted as Dresser with effect from March 1, 1963. The Dean of Irwin Group of Hospitals, Jamnagar, issued another Office Order No.170, dated June 5, 1963, posting the petitioner as Clerk, Irwin Hospital, Jamnagar against one of the three posts sanctioned as per Government Resolution dated April 22, 1963. The Dean of M.P.Shah Medical College, Jamnagar, thereafter issued an Office Order dated June 22, 1974 confirming the petitioner as Junior Clerk in the pay-scale of Rs. 130-240 from the date of issuance of the order. This order is also produced at Annexure-C collectively to the petition. A copy of order dated June 22, 1974 was submitted by the Dean of M.P.Shah Medical College, Jamnagar, to the Director of Health Services (Med.), Ahmedabad, for information. Accordingly, the Director of Health Services (Med.) Ahmedabad, addressed a letter dated August 22, 1979, to the Government pointing out the relevant facts to the State Government. On consideration of the matter, the Government noticed that the petitioner, who was initially appointed to man a Class-IV post, was temporarily promoted to Class-III post, but as a special case and by giving concession in the relevant Rules as well as in view of the Government Resolution dated April 17, 1970, the appointment of the petitioner as Junior Clerk was required to be regularised. The Government, therefore, by an order dated October 18, 1979 regularised the appointment of the petitioner on the post of Junior Clerk and directed that she would rank last in the seniority list of Junior Clerks.

3. Feeling aggrieved by the action of the Government in treating her as junior-most in the Cadre of Junior Clerks, the petitioner filed Appeal No. 654/1979 before Gujarat Civil Services Tribunal, Gandhinagar. The Tribunal rejected the appeal by an order dated June 27, 1980, holding that the order passed by the Government fixing seniority was beyond the scope of challenge before

the Tribunal.

4. Aggrieved by the order of the Government, dated October 18, 1979, the petitioner has filed the instant petition in February, 1988. The case of the petitioner is that she was appointed as a Junior Clerk by an Office Order dated December 15, 1961 with effect from December 2, 1961 and the Dean of Irwin Group of Hospitals, Jamnagar having confirmed the petitioner on the post of Junior Clerk by an order dated June 22, 1974, the petitioner is entitled to reckon her seniority with effect from December 2, 1961. What is maintained by the petitioner is that on confirmation of the petitioner by the respondent no.3 as a Junior Clerk vide order dated June 22, 1974, the petitioner is entitled to have her entire service counted with effect from December 2, 1961, and the decision of the Government to place her at the bottom of seniority list of Junior Clerks,is not only arbitrary, but violative of the principles enshrined in Articles 14 & 16 of the Constitution. According to the petitioner, the action of the respondents in denying 18 years' length of service in the matter of seniority, is arbitrary and not justified at all and, therefore, the respondents should be directed to treat her as a Junior Clerk with effect from December 2, 1961, and give her all consequential benefits, such as promotion etc. Under the circumstances, the petitioner has filed the present petition and claimed the reliefs to which reference is made earlier.

5. Though duly served, none of the respondents has filed any affidavit-in-reply controverting the averments made in the petition. Mr. J.R.Nanavati, learned counsel for the petitioner, contended that the petitioner was appointed as a Junior Clerk vide order dated December 15, 1961 with effect from December 2, 1961 and as her services as a Junior Clerk were confirmed by the respondent no.3 vide order dated June 22, 1974, she would be entitled to have her services counted with effect from December 2, 1961. According to the learned counsel for the petitioner, the action of the respondents in denying 18 years' length of service in the matter of seniority is not only arbitrary, but illegal and, therefore, the petition should be accepted. What was stressed was that in spite of several opportunities having been given, the respondents have failed to controvert the averments made in the petition and the just claim advanced by the petitioner should be accepted by the Court.

6. Mr. M.R.Mengde, learned counsel for the respondents, contended that the order passed by the

Government on October 18, 1979 treating the petitioner as junior-most in the cadre of Junior Clerks is challenged by the petitioner in the year 1988 and in view of well settled principle of delay and laches governing grant of relief in a petition filed under Article 226 of the Constitution, the instant petition should be dismissed. It was pleaded that those who are likely to be affected by the claim of the petitioner regarding her seniority, have not been impleaded as the respondents and, therefore, petition should fail in view of non-joinder of necessary parties. It was also pleaded on behalf of the respondents that while regularising the appointment of the petitioner on the post of Junior Clerk in terms of Government Resolution dated April 10, 1970, it was decided to treat the petitioner as junior-most in the cadre of Junior Clerk and as the said decision cannot be regarded as illegal or arbitrary, the relief claimed in the petition should not be granted.

7. I have heard the learned counsel for the parties and considered the documents forming part of the petition. What is challenged in the present petition is the order dated October 18, 1979 passed by the State Government by which the appointment of the petitioner on the post of Junior Clerk is regularised and she is treated as junior-most in the cadre of Junior Clerks. As noticed earlier, the present petition was filed in February, 1988 i.e. after about 9 years. Thus, there is no manner of doubt that there is delay and laches on the part of the petitioner in invoking the jurisdiction of the High Court under Article 226 of the Constitution. It is well settled that under Article 226, the power of a High Court to issue an appropriate writ is discretionary. The relief under Article 226 cannot be claimed as of right. No doubt, when the relief claimed is one relating to the enforcement or protection of fundamental right, the court has to grant it once the right and infringement thereof are established. But, if Article 226 is invoked "for any other purpose", it is discretionary power of the High Court to grant or to refuse such relief. One of the grounds for refusing relief under Article 226 is that the petitioner has been guilty of delay and laches. It is imperative, if the petitioner wants to invoke the extraordinary remedy available under Article 226 of the Constitution, that he/she should come to the Court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will be an adequate ground for refusing to exercise the discretion. It is essential that persons, who are aggrieved by any order of the Government or any executive action, should approach the High Court with utmost expedition. In an appropriate

case, the High Court may not exercise its discretion and may refuse to grant relief if there is such negligence or omission on the part of the applicant to assert his right. Having noticed this principle, which governs exercise of discretion in a petition under Article 226 of the Constitution, it would be relevant to refer to the explanation offered by the petitioner in Ground 8(d) of the petition, giving explanation as to why she could not invoke the jurisdiction of the High Court promptly. The said paragraph reads as under :

> "(d) The petitioner says that her husband has been ailing and suffering from diabetes since long and her young child also of 16 years of age is suffering from acute diabetes. The petitioner says that she is only earning member of the family. The petitioner having regard to her domestic circumstances could not file petition in time. The petitioner, therefore, craves justice from this Honourable Court in the matter of seniority and promotion."

A bare reading of the above-quoted paragraph makes it evident that except stating that her husband had been ailing and suffering from diabetes since long and that her young child aged 16 years, was also suffering from acute diabetes, no particulars have been given by the petitioner indicating the circumstances which prevented her from approaching the Court promptly. The record of the case would indicate that against the order dated October 18, 1979, the petitioner had filed Appeal No. 654/1979 before the Gujarat Civil Services Tribunal, Gandhinagar, and the said appeal was argued on her behalf by her husband. The appeal filed by the petitioner was rejected by the Tribunal vide order dated June 27, 1980, but thereafter no steps were taken by the petitioner to challenge legality of order dated October 18, 1979. The explanation offered by the petitioner is bereft of necessary particulars and can hardly be regarded as sufficient explanation for approaching the Court late. Under the circumstances, the instant petition is liable to be dismissed having regard to the principles of delay and laches.

8. Even otherwise, on merits it is to be found that the petitioner was initially recruited in Class-IV post and was promoted to the post of Junior Clerk temporarily. The record would show that from time to time the petitioner was reverted to the post of Dresser in lower grade. It is an admitted position that the petitioner had suffered the reversion without raising any objection

and the petitioner has not explained in the petition as to why she was reverted to the post of Dresser and why the reversion was accepted by her. The claim of the petitioner that she having been confirmed as a Junior Clerk by an order dated June 22, 1974, her seniority should be counted with effect from December 2, 1961 i.e. the date on which she was appointed as Junior Clerk for 30 days vice Mr. V.M.Bhatt, who was promoted as a Senior Clerk, cannot be accepted. Though the Dean of M.P.Shah Medical College, Jamnagar, passed an order dated June 22, 1974 confirming the petitioner as a Junior Clerk, the same was subject to approval by the Government and, therefore, a copy of the said order was forwarded to the Director of Health Services (Medical), Ahmedabad for necessary action. The order dated October 18, 1979 passed by the Government shows that the appointment of the petitioner on the post of Junior Clerk was not regularly made. However, the petitioner having served for a long period on the post of Junior Clerk, the proposal to regularise her services was considered favourably by the Government and in the light of Government Circular dated April 10, 1970, her services were regularised and it was decided that she should be placed at the bottom of the seniority list of Junior Clerks. The petitioner has not produced the Government Circular dated April 10, 1970 for consideration of the Court. The petitioner has accepted her regularisation of services. Meaning thereby the petitioner has accepted the fact that her appointment was made irregularly and that regularisation of services was needed. However, she has not disclosed in the petition as to which irregularities/illegalities were committed by the then Dean of M.P.Shah Medical College while appointing her on the post of Junior Clerk and which Rules were relaxed by the Government before regularising her services. The learned counsel for the petitioner could not point out to the Court as to what were the qualifications needed for being appointed as a Clerk and whether the Dean of the College had authority to make the appointment of the petitioner on the post of Clerk. Naturally, one who is not regularly appointed, would rank last in the seniority list and, therefore, the decision of the Government to treat the petitioner as junior-most in the cadre of Junior Clerks cannot be regarded as arbitrary or illegal. The Supreme Court in Registrar General of India and Another v. V.Thippa Setty and others, (1998)8 SCC 690 has explained the concept of regularisation of service and ruled for the guidance of the Courts in the Country and executive that regularisation of services should ordinarily be prospective and not retrospective so that seniority of those, who are already in regular service,

is not affected. The decision of the State Government, dated October 18, 1979 to place the petitioner at the bottom of seniority list of Junior Clerks while regularising her services, is perfectly in tune with the decision of the Supreme Court referred to above and cannot be faulted with on any count.

9. Further, if the claim of the petitioner to count her seniority as Junior Clerk with effect from December 2, 1961, is accepted, it is bound to affect the seniority of several other Junior Clerks who are not impleaded as party-respondents in the petition. Without hearing them, such a relief of far reaching consequence cannot be granted, and on this ground also the petition is liable to fail.

10. The plea that the respondents have not filed reply-affidavit and, therefore, relief as prayed for in the petition should be granted on the basis that the case pleaded by the petitioner is accepted by the respondents, is merely stated to be rejected in view of the decision in State of Haryana V. Haryana Civil Secretariate Personal Staff Association, (2002)6 SCC 72, wherein it is ruled that relief cannot be granted merely because averment in writ petition had not been specifically rebutted and High Court is bound to consider the averment on its merits before granting relief to the writ petitioner.

11. On overall view of the matter, I am of the opinion that the petitioner has failed to establish that the decision dated October 18, 1979 treating her as junior-most in the cadre of Junior Clerks,is in any manner illegal or arbitrary and, therefore, the petition is liable to be dismissed.

For the foregoing reasons, the petition fails and is dismissed. Rule is discharged with no order as to costs.

(J.M.Panchal,J.)

(patel)